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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re E.S. et al., Persons Coming Under the  
Juvenile Court Law.

B214847  
(Los Angeles County  
Super. Ct. No. CK40730)

LOS ANGELES COUNTY DEPARTMENT  
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.S.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County. Marilyn Mordetzsky, Referee. Affirmed.

James M. Owens, Assistant County Counsel, and Frank J. DaVanzo, Principal Deputy County Counsel, for Plaintiff and Respondent.

Nicole Williams for Defendant and Appellant.

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J.S. (“Father”), the father of minors E.S., E.D., and J.D., appeals from the juvenile court’s order terminating his parental rights pursuant to Welfare and Institutions Code section 366.26.<sup>1</sup> Father contends that the juvenile court erred in failing to follow section 366.26, subdivision (c)(1)(B)(i).<sup>2</sup> We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I. The Initiation Of Detention Proceedings**

Father and L.D. (“Mother”) are the parents of E.S. (a girl born in June 1999), E.D. (a girl born in December 2000), and J.D. (a boy born in June 2003). As of 2005, the three minors were residing with Father and their stepmother, R.M. Mother’s location was unknown. This matter came to the attention of the Los Angeles Department of Children and Family Services (the “DCFS”) on July 5, 2005, when the DCFS received a referral alleging emotional abuse and general neglect of the minors by Father and R.M.<sup>3</sup>

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Effective January 1, 2008, the six statutory exceptions to the termination of parental rights formerly contained in section 366.26, subdivision (c)(1)(A) through (F), were renumbered, without substantive change, and are now found in section 366.26, subdivision (c)(1)(B)(i) through (vi). The current section 366.26, subdivision (c)(1)(B)(i) provides that the juvenile court may decline to terminate parental rights if it “finds a compelling reason for determining that termination would be detrimental to the child” because “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

<sup>3</sup> Prior to 2005, the DCFS had investigated numerous allegations of physical abuse and general neglect of the minors by both Father and Mother. In 2000, a section 300 petition was sustained as to E.S. and E.D. on the grounds that Mother had a history of methamphetamine use and had allowed E.S. to wander along a highway without any supervision. In 2003, a section 300 petition was sustained as to J.D. based on Mother’s drug use during her pregnancy and on Father’s conduct in leaving J.D. with relatives who had criminal histories and were not approved to be substitute care providers. While the 2003 case was pending, Father was found to have left J.D. with another family member without making any provision for the minor’s care.

On July 14, 2005, Father and R.M. agreed to a voluntary family maintenance plan. Although Father attended a parenting program, he failed to comply with the rest of the case plan which required, among other things, domestic violence counseling for Father, individual counseling for the children, and regular school attendance by E.S. and E.D. On December 21, 2005, R.M. reported to the DCFS that Father had physically assaulted her during a domestic dispute. The following week, Father informed the DCFS that he would no longer comply with the family maintenance plan and asked that the case be closed.

On January 11, 2006, the DCFS filed a section 300 petition on behalf of the minors. The petition alleged that the minors were periodically exposed to episodes of domestic violence between Father and R.M. It further alleged that Father physically abused E.S. and E.D. by repeatedly choking, pushing, and striking E.S., and by repeatedly striking E.D. as routine forms of discipline. The petition also alleged that E.S. showed symptoms of sexual abuse, including age inappropriate awareness of adult sexual activity and incidents of fondling the genitalia of her two younger siblings.

In January 2006, the DCFS interviewed various family members about the most recent allegations of abuse and neglect. According to E.S., Father generally disciplined her by hitting her with a belt, smacking her in the face, and making her “look at the corner for a long time.” She also reported that Father had choked her and punched her in the past, and that he recently slapped her face with an open hand and pushed her against a wall. E.S. further stated that Father caused her to bleed on one occasion when he punched her in the nose and on another occasion when he threw a pen at her head. According to E.D., Father occasionally hit her with a belt and in the face, but he mostly disciplined E.D. by making her stand in a corner. E.D. also described acts of domestic violence between Father and R.M., including an incident where Father choked R.M. and hit her on the mouth. The minors’ step-siblings confirmed that Father was physically abusive toward R.M. and E.S. In addition, the step-siblings described sexualized behavior by E.S. toward her younger brother, J.D.

In their interviews with the DCFS, both Father and R.M. denied that Father had ever physically abused any of the children. They insisted that their only form of punishment was to place the children in a corner or to slap them on the hand or rear. While Father also denied witnessing any sexualized behavior by E.S., R.M. reported that she had seen E.S. touch the genitalia of E.D. and J.D. on various occasions. Subsequent medical examinations of the minors showed that E.S. had a right back and hip contusion, E.D. had a right leg bruise, and J.D. had a facial bruise. No physical evidence of sexual abuse was found during the examination of E.S.

On January 17, 2006, the juvenile court ordered that the minors be detained and that family reunification services be provided to Father. On April 18, 2006, Father submitted a waiver of his right to an adjudication hearing on the petition and stipulated to a mediation agreement. The juvenile court sustained the dependency petition, declaring the three minors dependent children of the court under section 300, subdivisions (a), (b) and (j), and removing them from the custody of Father and R.M. The court granted Father monitored visitation with the minors and ordered that he complete a parenting education program, a sexual abuse awareness counseling program, and a domestic violence counseling program. The minors initially were placed with a maternal relative, but later were moved into separate foster homes during the dependency proceedings.

## **II. The Six-Month Review Hearing And Reunification Efforts**

A six-month review hearing was held on October 17, 2006. In its status review report, the DCFS noted that Father had completed a nine-week parenting education program, but had been discharged from the domestic violence program due to poor attendance and failure to pay and had not attended a sexual abuse awareness program. The DCFS also reported that between May and September 2006, Father had visited the children seven times out of 21 scheduled visits and had called them on only two occasions. According to the case social worker, Father initially was defensive in his dealings with the DCFS, but later became more cooperative and took responsibility for the children's behavioral issues. Father informed the case social worker that he did not believe he could care for the minors because of his inability to maintain employment, but

he wanted the children to be in the best place for them. Father was agreeable to having the paternal grandmother care for all three children.

In its report, the DCFS recommended that the court consider placement of the children with their paternal grandmother, L.S., who was living in North Carolina at the time. The DCFS also recommended that Father's reunification services be terminated. At the October 17, 2006 review hearing, the juvenile court terminated Father's reunification services, and set a section 366.26 selection and implementation hearing for February 22, 2007.

### **III. The Selection Of Legal Guardianship As The Permanent Plan**

In its report for the February 22, 2007 section 366.26 hearing, the DCFS noted that Father had visited the minors only once since the last court hearing. The case social worker advised Father that he had to be consistent in his visitation because it negatively affected the children when he failed to attend his scheduled visits. Although weekly visitation was arranged for Father at his request, he did not maintain regular contact with the minors. The paternal grandmother, on the other hand, visited the children on a regular basis and had a loving relationship with them. The paternal grandmother informed the DCFS that she had moved to California and was interested in adopting all three children. The case social worker recommended in her report that the minors be placed with the paternal grandmother with adoption as the permanent plan. At the February 22, 2007 hearing, the juvenile court continued the matter so that a home study could be completed for the paternal grandmother.

In a May 30, 2007 status review report, the DCFS informed the court that the paternal grandmother had decided to withdraw her application to adopt and to instead seek legal guardianship so that Father might be able to reunify with the minors in the future. After meeting with the paternal grandmother, the DFCS began to pursue other possible adoptive placements for the minors and found a relative who was interested in adopting all three children. The DCFS had placed E.S. in the prospective adoptive home and planned to move E.D. and J.D. into the home after a period of time so that each child could bond individually with the family.

In its May 30, 2007 report, the DCFS also noted that Father had been visiting the minors on a more consistent basis since the last court hearing. The case social worker observed that Father was very loving toward the children during his visits, but had limited parenting skills and difficulty controlling their behavior. She further noted that the children were always excited to see Father, but experienced anxiety prior to his visits due to their uncertainty about whether he would attend. Both E.S. and E.D. expressed to the case social worker that they loved Father and would like to live with him, but feared that Father would not be able to care for them and would hit them again. E.S. and E.D. also indicated that they were happy to live in the home of the prospective adoptive parents because they had known them for a long time and identified themselves as a part of their family. The DCFS continued to recommended that parental rights be terminated and that adoption be selected as the permanent plan.

In an October 17, 2007 addendum report, the DCFS reported that Father did not have any contact with the children from October to December 2006. Father visited the minors a total of eight times between January and April 2007, but had no contact with them over the next three months. Father then visited them once in September 2007 and once in October 2007. The report noted that the children loved Father, but doubted his commitment to them because of the inconsistency in his visits. According to the case social worker, the children became anxious and aggressive toward one another before Father's scheduled visits and required constant reassurance that he would attend. After the visits, the children often were emotional and expressed feelings of uncertainty about whether Father would visit them again. E.S. stated that she loved Father and would like to live with him, but knew that he would not make sure she was safe. E.D. asserted that if Father loved her and wanted her to live with him, he would contact her to see how she was doing. The case social worker observed that Father was affectionate and playful with the children during their visits, but was unable to set boundaries or to provide them with structure. She also noted that the children had developed a strong bond with their prospective adoptive parents and were thriving in their new home.

In a November 28, 2007 addendum report, the DCFS provided additional information about the prospective adoptive parents, T.F. and L.F. The F.'s were a married couple with three biological children. All three minors had been residing with the F.'s since April 2007, and referred to them as their mother and father. An adoptive home study was approved for the F.'s on September 6, 2007. The F.'s indicated that they were committed to providing the minors with a stable and permanent home and were agreeable to the biological parents continuing to visit the children as long as the visits were beneficial to them. In an accompanying status review report, the DCFS stated that Father had attended visits with the children on October 19, 2007, and November 2, 2007, but had failed to appear at a scheduled visit on October 26, 2007. The DCFS continued to recommend a permanent plan of adoption.

At the section 366.26 hearing held on January 2, 2008, the juvenile court stated on the record that the parties had “now agreed that the best thing for the children would be for the recommendation to be legal guardianship with the current caretakers for the children . . . based on the children’s wishes concerning their father.” On January 18, 2008, the juvenile court appointed the F.'s legal guardians for the minors. The court found that the children were not adoptable because the parties had agreed that the (c)(1)(B)(1) exception applied and that a permanent plan of guardianship was in the minors’ best interests. The court ordered that Father be allowed to visit the children in accordance with the current schedule, and continued the matter for a permanent plan review hearing.

In its July 18, 2008 status review report, the DCFS noted that since the last court hearing, Father had visited the children on six occasions and had cancelled four other visits. The DCFS also reported that E.S. recently had raised an allegation of sexual abuse by Father, and that an emergency response social worker had interviewed E.S. about her allegation. E.S. expressed to the social worker that she enjoyed her visits with Father, but feared that he would hit her again if the visits were unmonitored. E.S. repeated her claim that Father had touched her inappropriately in the past, and raised an additional allegation that a cousin touched her “private area” when the F.'s were not present. Father was

shocked by E.S.'s allegations and denied that he ever sexually abused any of the children. Father indicated that he believed the F.'s were causing E.S. to fabricate a story of sexual abuse and were trying to control his visits with the children. The social worker found E.S.'s sexual abuse allegations to be inconclusive.

At the July 18, 2008 review hearing, counsel for E.S. and E.D. informed the court that the children were doing well in the home of their legal guardians and had decided that they wanted to be adopted. Counsel asked the court to set a section 366.26 hearing to consider a new permanent plan of adoption. The court agreed to continue the matter to August 15, 2008, so that the DCFS could serve proper notice on the parties regarding the setting of a section 366.26 hearing. On August 15, 2008, the court set a section 366.26 selection and implementation hearing for December 15, 2008.

#### **IV. The Selection Of Adoption As The Permanent Plan**

In its report for the December 15, 2008 section 366.26 hearing, the DCFS stated that the F.'s were committed to adopting all three children and providing them with a stable and permanent home. The DCFS also reported that the F.'s had established a solid bond with each of the children and that the children had expressed their desire to stay with the F.'s. The DCFS indicated that, since the last court hearing, Father's visits with the minors had been sporadic for various reasons, including Father's difficulty with transportation and the paternal grandmother's inability to be present to monitor the visits. However, the children enjoyed the visits that Father did attend, and Father was very engaged with them. Based on its assessment, the DCFS recommended that the juvenile court terminate parental rights and order a permanent plan of adoption. On December 15, 2008, the juvenile court set the matter for a contested section 366.26 hearing at Father's request. The court also ordered that Father continue to have monitored visitation with the children for a minimum of three hours per week subject to the minors' availability.

In a February 2, 2009 interim review report, the DCSF indicated that the children's social worker had interviewed E.S. and E.D. about a recent visit with Father and their paternal grandmother on January 18, 2009. E.S. reported that the paternal grandmother had told the children during the visit that adoption means "you become part



of a new family and you don't get to see us." When E.S. responded that her legal guardians would "never do that," the paternal grandmother laughed. E.S. told the social worker that she wanted to be adopted by the F.'s and to only have visits with Father. E.D. similarly reported to the social worker that the paternal grandmother had said that the children were "not going to be part of her family anymore because [they] are going to be adopted." Like E.S., E.D. stated that she wanted to be adopted by the F.'s and to live with them "forever." Both E.S. and E.D. became emotional during the interviews and expressed fear that they would be removed from the F.'s' home and returned to Father. In contrast, the children appeared happy when describing their relationship with the F.'s and their activities with their prospective adoptive family.

The F.'s informed the DCFS that the children had been upset and emotionally unstable since the January 18, 2009 visit, and that they were exhibiting setbacks in their behavior. The F.'s indicated that the children were afraid to tell Father that they wanted to be adopted. The minors' individual therapists confirmed that the children were showing some signs of regression. J.D.'s therapist reported that J.D. had made substantial progress since starting therapy, but that there recently had been a dramatic change in his behavior with the child becoming more angry, aggressive, and withdrawn. E.D.'s therapist explained that E.D. had been making progress in therapy, but recently had returned to her previous level of functioning with withdrawn behavior and difficulty verbalizing feelings. The therapist also noted that E.D. had been struggling with adoption issues because she feared that her biological parents would be angry at her for being adopted. E.S.'s therapist similarly reported that E.S. had been upset in recent weeks and appeared to be afraid of being removed from her legal guardians. In its February 2, 2009 report, the DCFS recommended that the paternal grandmother no longer be the monitor for Father's visits and that Father and the paternal grandmother be ordered not to discuss case issues with the children. The DCFS continued to recommend that parental rights be terminated.

At a February 17, 2009 review hearing, the juvenile court considered whether the paternal grandmother should continue to serve as the monitor for Father's visits. The

court inquired whether the F.'s would permit contact between Father and the children after a termination of parental rights. Counsel for E.S. and E.D. responded that the F.'s had represented to her on numerous occasions that they would allow contact with the children's biological family to continue. Counsel further noted that, prior to the last section 366.26 hearing, E.S. and E.D. had been pressured by Father and the paternal grandmother to state that they did not want to be adopted, which had led to the appointment of a legal guardianship. However, after not having contact with Father or the paternal grandmother for a period of time, the children had changed their mind and decided that they wanted adoption. At the conclusion of the hearing, the court found that it was in the best interests of the minors that the paternal grandmother not monitor Father's visits, and that Father's visits be arranged with a monitor approved by the DCFS.

On March 10, 2009, the juvenile court held a contested section 366.26 hearing. Father testified at the hearing that every time he visited the children, they told him that "they want to come home." He also stated that one of his daughters had said that her legal guardian, L.F., had promised to buy her things if she told the court that she wanted to be adopted. Father asserted that he would not have contested the F.'s' adoption of the children if he believed that the children were happy in the F.'s' home. Father acknowledged that his visits with the children had not always been consistent, but he attributed it to scheduling conflicts with the social workers or the F.'s and to inadequate money for gas.

According to Father, over the past year, he visited the children once every two weeks. During those visits, he would take the children to the park or to Chuck E. Cheese's where they would eat, play, and talk about their day. Father indicated that the children were happy and excited whenever they saw him and easily showed him affection. In contrast, the children became sad at the conclusion of the visits and asked Father if he could take them with him. Father also testified about the paternal grandmother's recent comments to the children regarding the prospect of adoption. According to Father, the paternal grandmother told the children that if they were adopted, they might not be able to see Father or the paternal grandmother anymore because it

would be up to the adoptive parents to decide whether the visits would continue. Both E.D. and J.D. became upset upon hearing that they might not see Father again and told Father that they wanted to go home with him.

Father testified that he was asking the court not to terminate his parental rights because he believed that his children needed him in their lives. He asserted that he was trying to become “a better parent and a better person.” He also stated that he simply wanted his children to know that he would always be there for them and that he would not abandon them as their biological mother did. Father testified that “all I want is my visitations. . . . If they tell you guys they want to stay there and they’re happy there, then . . . honestly, I would not be here. I just want the best for my kids.”

On cross-examination, Father admitted that he did not fully comply with the counseling programs required by his family reunification plan, but asserted that it was because he was unable to afford some of the courses. With respect to the minors’ relationship with the F.’s, Father testified that the children had told him that L.F. made them call the F.’s “Mom” and “Dad,” and that L.F. was mean to E.S. at times when she was sad. Father could not explain, however, why the children had expressed to the case social worker that they were happy in the F.’s’ home. In addition, Father acknowledged that the F.’s had never told him that he would not be allowed to continue visiting the children if they were adopted.

Father also conceded that the pending case was the third dependency proceeding involving his children. He admitted that E.S. and E.D. had been removed from his custody in 1999 and returned to him in 2001, and that J.D. had been removed from his custody in 2003 and returned to him later that year. However, Father denied that he had been accused of inappropriately disciplining the children in the current case, or that the juvenile court had sustained such an allegation against him. Father also testified that the F.’s’ legal guardianship had allowed him more time to make changes in his life so that he could reunify with the children in the future.

After hearing the argument of counsel, the juvenile court found as follows:

Once the reunification services are terminated for a parent, the court has to look to see what's in the best interest of the children. And part of looking at what's in the best interest is they have a right to permanency. They have a right to have a stable and permanent life. . . . [¶] Certainly the father has had ample time to show to this court that he could step in the shoes of being a parent in this case. Certainly there's no question that the father love these children. There's no question that the children love their father. They love the continual contact that they have with their father. But that's not what the court has to look at today. The court has to look to see whether the exception applies. And today there is no evidence that would indicate to this court that the exception would apply in this particular case.

The court found by clear and convincing evidence that the children were adoptable and that it would be detrimental to their well-being to return them to their biological parents. The court terminated the parental rights of Father and Mother and ordered adoption of the children as the permanent plan. On March 19, 2009, Father filed a timely notice of appeal.

## **DISCUSSION**

At a hearing under section 366.26, the juvenile court must select and implement a permanent plan for a dependent child. Where there is no probability of reunification with a parent, adoption is the preferred permanent plan. (*In re Edward R.* (1993) 12 Cal.App.4th 116, 122.) For the juvenile court to implement adoption as the permanent plan, it must find, by clear and convincing evidence, that the minor is likely to be adopted if parental rights are terminated. (§ 366.26, subd. (c)(1).) Then, in the absence of evidence that a relative guardianship should be considered (§ 366.26, subd. (c)(1)(A)) or that termination of parental rights would be detrimental to the child under one of six statutorily-specified exceptions (§ 366.26, subd. (c)(1)(B)(i)-(vi)), the juvenile court “shall terminate parental rights.” (§ 366.26, subd. (c)(1).)

To satisfy the claimed exception to the termination of parental rights in this case, Father had to prove that he had “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd.

(c)(1)(B)(i); see also *In re Derek W.* (1999) 73 Cal.App.4th 823, 826 [“parent has the burden to show that the statutory exception applies”].) A beneficial relationship within the meaning of section 366.26, subdivision(c)(1)(B)(i) is one that “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) To establish the exception, “the parents must do more than demonstrate ‘frequent and loving contact’ [citation], an emotional bond with the child, or that the parents and child find their visits pleasant. [Citation.] Rather, the parents must show that they occupy ‘a parental role’ in the child’s life. [Citation.]” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109.) Moreover, “[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

In this case, Father’s sole contention on appeal is that there was no substantial evidence to support the juvenile court’s finding that the section 366.26, subdivision (c)(1)(B)(1) exception did not apply, and therefore, it was reversible error for the court to terminate Father’s parental rights. Most appellate courts review a trial court’s determination on the applicability of the section 366.26, subdivision (c)(1)(B)(i) exception for substantial evidence (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576 [considering former § 366.26, subd. (c)(1)(A)]), although at least one court has concluded that it is properly reviewed for an abuse of discretion. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351 [considering former § 366.26, subd. (c)(1)(A)].) We need not resolve this difference of opinion here, for under either standard we would uphold the termination of parental rights. Analyzing the juvenile court’s ruling under the more exacting standard, we affirm the order because it is supported by substantial evidence.

At the March 10, 2009 section 366.26 hearing, there was conflicting evidence before the juvenile court about the frequency of Father’s contact with the children. In its 2008 and 2009 status review reports, the DCFS informed the court that Father’s visitation

with the children had been very sporadic, in part, because of scheduling conflicts between Father, the DCFS, and the children. Father, on the other hand, testified that although he had not always been consistent in his visitation, he had been visiting the children every two weeks over the course of the past year. Even if we assume that Father's contact with the children was sufficiently regular to satisfy the "visitation" prong of the section 366.26, subdivision (c)(1)(B)(i) exception, the record fails to demonstrate that Father occupied a parental role in the children's lives sufficient to establish the "beneficial relationship" prong. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420 [parent-child relationship exception requires "a continuing parental relationship; not one . . . when a parent has frequent contact with but does not stand in a parental role to the child"].)

In his testimony at the section 366.26 hearing, Father described a positive and loving relationship with the children, but he did not demonstrate that such relationship rose to a parental level. According to Father, during his monitored visits, he would take the children either to the park or to a family entertainment center where they would eat, play, and talk about their day. The children were always excited to see Father at the start of their visits, enjoyed the time that they spent with him, and appeared to be sad when the visits ended. The children also easily showed affection to Father and were comfortable talking to him about their experiences at school and how they were doing. The DCFS's case social worker confirmed that when Father attended his scheduled visits, the children enjoyed their time together and Father was very engaged with the children.

However, because a child normally will derive some incidental benefit from interaction with a natural parent, "[c]ourts have required more than just 'frequent and loving contact' to establish the requisite benefit for [the section 366.26, subdivision (c)(1)(B)(i)] exception." (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534; see also *In re Autumn H.*, *supra*, 27 Cal. App. 4th at p. 575 ["Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent."].) Although a

beneficial relationship can exist even without day-to-day contact, the parent still must occupy a parental role in the child's life. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) To be simply a "friendly visitor" is not sufficient. (*Id.* at p. 52; see also *In re Angel B.* (2002) 97 Cal.App.4th 454, 468 ["for the exception to apply, the emotional attachment between the child and parent must be that of parent and child rather than one of being a friendly visitor"].) Here, although Father's testimony evinced a friendly and loving relationship with the children, it did not demonstrate that the relationship reached the level at which the 366.26, subdivision (c)(1)(B)(1) exception would apply.

Furthermore, there was evidence before the juvenile court that the children were thriving in the home of their prospective adoptive parents, the F.'s. After spending significant portions of their lives in foster care, the children had been living with the F.'s for nearly two years, and had developed a strong and loving bond with the family. They referred to the F.'s as their mother and father and to the F.'s' biological children as their siblings. According to both the F.'s and the children's individual therapists, the children also had shown a significant improvement in their behavioral issues. Although the two younger children, E.D. and J.D., demonstrated some regression in their behavior shortly before the section 366.26 hearing, it appeared to stem from the paternal grandmother's inappropriate remarks about the prospect of adoption and from the children's fear of being removed from the F.'s home. In addition, both nine-year-old E.S. and eight-year-old E.D. repeatedly expressed to their case social worker and their counsel that they wanted to be adopted by the F.'s. In light of the evidence before the juvenile court, Father's testimony of a loving relationship with the children failed to establish that his relationship "promote[d] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

In support of his argument that the exception applied, Father relies on the statements of E.S. and E.D. that they wanted their visits with Father to continue. Father contends that the children's stated desire to maintain contact with him constituted strong demonstrative evidence that a beneficial parent-child relationship

existed. Although it is true that E.S. and E.D. expressed a desire to continue visiting Father, they were also clear in their discussions with the DCFS and their counsel that they wanted to be adopted by the F.'s and to reside with the F.'s permanently. In fact, both E.S. and E.D. became emotional when discussing the pending court proceedings with the case social worker and expressed fear that they would be removed from the F.'s' custody and returned to Father. The DCFS documented the children's feelings about both adoption and visitation in its reports to the juvenile court, and counsel for E.S. and E.D. similarly described the children's wishes at the section 366.26 hearing. The court thus had sufficient information about the children's views on the subject to properly assess their wishes and to determine whether adoption was in their best interests. (See *In re Leo M.* (1993) 19 Cal.App.4th 1583, 1592 [juvenile court should strive "to explore the minor's feelings regarding his/her biological parents, foster parents, and prospective adoptive parents. . . . [A]n attempt should be made to obtain this information so that the court will have before it some evidence of the minor's feelings from which it can then infer his/her wishes regarding the issue confronting the court"].)

Father also asserts that the minors' counsel improperly focused their arguments at the section 366.26 hearing on the F.'s' assurances that they would facilitate post-adoption visitation between Father and the children. He argues that a court may not rely on a prospective adoptive parent's willingness to allow continued visitation in deciding whether to terminate parental rights. (See *In re S.B.* (2008) 164 Cal.App.4th 289, 300 ["We do not believe a parent should be deprived of a legal relationship with his or her child on the basis of an unenforceable promise of future visitation by the child's prospective adoptive parents."].) However, the record in this case does not support a conclusion that the juvenile court based its decision to terminate parental rights on the F.'s' promise to continue Father's visits with the children. Instead, the court focused its decision on whether Father's relationship with the children demonstrated that he occupied a parental role in their lives. The court found that, while there was "no question that the father loves these children," he had not shown that he "could step in the shoes of being a parent in this case." We agree.



The evidence before the juvenile court demonstrated that Father had developed a positive and loving relationship with the children, but it did not establish the kind of parental relationship that section 366.26, subdivision (c)(1)(B)(i) was designed to preserve. (See *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350 [“[A] child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child’s need for a parent. It would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship.”].) Accordingly, substantial evidence supported the juvenile court’s finding that the section 366.26, subdivision (c)(1)(B)(i) exception did not apply.

#### **DISPOSITION**

The order of the juvenile court terminating parental rights is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.